In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 191

EMERSON INSTITUTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The Internal Revenue Codes of 1939 and 1954 both provide in part that corporations organized and operated exclusively for educational purposes are exempt from income and employment taxes.[1] The petitioner, having filed a certificate of incorporation as an educational institution in the office of the Recorder of

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[1] See Sections 501(a), (c)(3) and 3121(b)(10)(A) of the Internal Revenue Code of 1954 and Sections 101(6), 1426(b)(9)(B), and 1607(c)(8) of the Internal Revenue Code of 1939.

Deeds of the District of Columbia in 1941, obtained a ruling from the Treasury Department in 1945 that it was exempt from federal income and employment taxes (R. 8, 9; Exs. A, B).[2] That ruling reads in part as follows (Ex. B):

> Accordingly, you will not be required to file returns of income unless you change the character of your organization, the purposes for which you were organized, or your method of operation. Any such changes should be reported immediately to the collector of internal revenue for your district in order that their effect upon your exempt status may be determined.

In September 1946, the two surviving trustees of the petitioner executed a certificate of dissolution (R. 9), which was filed in the office of the Recorder of Deeds in October 1946 (R. 18). At the same time they also executed a partnership agreement (R. 9), which was filed in the Office of the Recorder of Deeds in February, 1947 (R. 18). Under that agreement, the two partners agreed to continue the operation of the Emerson Institute and to share the profits and losses of the enterprise equally (R. 18; Ex. D). There is nothing in the record to show, nor is it claimed, that the petitioner ever reported to the Internal Revenue Service that the certificate of dissolution and the partnership agreement had been executed, despite the fact that the above-mentioned 1945 ruling of exemption stated that any

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[2] "R." references are to the Joint Appendix filed with the brief for the appellant in the court of appeals. "Ex." references are to exhibits which have been lodged with the Clerk of this Court.

changes in the character of the organization or the method of operation should be reported immediately.

When in 1957 the Internal Revenue Service learned that the corporation known as Emerson Institute had purportedly been dissolved in September, 1946, and its activities and operations taken over by a partnership, it ruled that the previous exemption had terminated (Ex. I). In the meantime, one of the two partners, Fred P. Myers, had died in 1953, and the surviving partner, John J. Humphrey, had purchased Myers' interest in the partnership from the latter's widow in 1954 (R. 9, 22).

In 1959 the Internal Revenue Service addressed two letters to "John J. Humphrey, trading as Emerson Institute" demanding payment of F.I.C.A. taxes accrued during 1956 (R. 10). In May, 1960, the petitioner and John J. Humphrey filed suit in the United States District Court for the District of Columbia against Mrs. Myers (widow of the deceased partner) and John B. Duncan (Recorder of Deeds), seeking to have the certificate of dissolution and the agreement of partnership canceled (R. 13; Ex. J). Mrs. Myers "conceded that there [was] no genuine issue as to any material fact"; and the Recorder of Deeds "offered no opposition to Plaintiff's Motion for Summary Judgment" (R. 15). In August 1961, the district court entered a decree canceling the certificate of dissolution and the partnership agreement, but sustaining the validity of the sale of the deceased partner's interest to Humphrey (R. 24-25).

The petitioner paid the F.I.C.A. taxes that the Internal Revenue Service demanded and filed a timely

claim for refund in 1961 (R. 10). The claim was denied (R. 5), and petitioner commenced this action for refund (R. 2-5). Both parties filed motions for summary judgment (R. 29-30), and the district court denied the petitioner's motion and granted the government's without opinion (R. 30-31). The court of appeals affirmed the judgment of the district court on the grounds (1) that the petitioner was not, for tax purposes, a corporation during the years 1946 to 1961, and (2) that even if the 1961 decree were deemed to be effective *nunc pro tunc*, the decree was not, under well-established principles, binding for tax purposes on the Internal Revenue Service since the Service was not a party to the proceedings.

Emerson Institute was operated as an individual proprietorship during the taxable period here involved. Since individual proprietors are not eligible for exemption under Section 501(c)(3), the decision of the court below is obviously correct. Moreover, there is no conflict of decisions or other ground warranting further review. *Dartmouth College* v. *Woodward*, 4 Wheat. 518, cited by the petitioner (Pet. 7), holds that the attempt of a State to alter the charter of a corporation without the latter's consent impairs the obligation of the charter and is therefore void. There was no attempt by the government to change the charter of the petitioner in this case. Petitioner also relies (Pet. 7) on *United States* v. *Mount Vernon Mortgage Corp.*, 128 F. Supp. 629 (D.D.C.), affirmed, 236 F. 2d 724 (C.A. D.C.), certiorari denied, 352 U.S. 988. But that case also is clearly distinguishable, for the trustees there made no attempt to dis-

solve the charitable corporation and form a partnership to take over its operations.

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

July, 1966.

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